UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BAORD
DIVISION OF JUDGES – SAN FRANCISCO BRANCH

UNITED STATES POSTAL SERVICE,
Pine Street Station Post Office,
Respondent,

Case 20–CA–111346

and

OPHELIA SOSA, an Individual,
Charging Party.

Jason Wong, Esq., **for the General Counsel**.
Rebecca R. Horan, Esq., **for the Respondent**.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. I heard this case in San Francisco, California on March 17–18, 2014. Charging Party Ophelia Sosa (Sosa or Charging Party) filed the charge in Case 20–CA–111346 alleging that the United States Postal Service (Respondent or USPS) committed violations of Sections 7, 8(a)(1) and (4) of the National Labor Relations Act (the Act). Sosa filed the charge on August 15, 2013. On November 26, 2013, the General Counsel issued a complaint and notice of hearing against Respondent alleging that Respondent violated sections 8(a)(1) and (4) of the Act. Respondent filed a timely answer to the complaint on December 16, 2013, denying the allegations.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs[1].

[1] For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s); documentary evidence is referred to either as "GC Exh." for a General Counsel exhibit, "R. Exh." for a Respondent exhibit, and "Jt. Exh." for an exhibit submitted jointly on stipulation from General Counsel and Respondent; and reference to the General Counsel's posthearing brief shall be "GC Br." followed by the applicable page numbers; and the same for Respondent's posthearing brief referenced as "R. Br." Charging Party did not file a posthearing brief. Citations to the record are not meant to be exhaustive.

On April 29, 2014, the General Counsel filed a motion to strike the first and fourth sentences of the third paragraph at page 8 of Respondent's posthearing brief arguing that Manager James Luiz did not testify at hearing so facts attributed to him in Respondent's brief should be stricken as unsupported by the admitted record evidence. I grant the unopposed motion and strike the requested facts finding them unsupported by the record evidence.

Upon the entire record[2], from my observation of the witnesses and having considered the posthearing briefs of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a government agency, with an office and place of business in San Francisco, California, has been engaged in the operation of mail delivery services in San Francisco, California. It is admitted and I find that the Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (the PRA), and that Respondent is subject to the regulatory authority of the National Labor Relations Board, as provided under the PRA, 39 U.S.C. Secs. 101, et seq. It is also admitted and I further find that the National Association of Letter Carriers (NALC or Union) is a labor organization within the meaning of Section 2(5) of the Act.

It is further admitted and I find that at all material times Joseph Stallworth, supervisor, Sara Rosales, supervisor, Joseph Cheng, supervisor, Jim Luiz, manager, Mike Datangel, manager, Ravi Bainiwal, manager, John Yang, supervisor, and Luis Guidos, supervisor, each held the position mentioned and have been Respondent's supervisors within the meaning of Section 2(11) of the Act and Respondent's agents within the meaning of Section 2(13) of the Act. (Tr. 11–12; Jt. Exh. 8.)

II. THE ALLEGED UNFAIR LABOR PRACTICES

A) Background: Terms of collective bargaining agreement between Respondent and Union, and related documents, govern assignment of work to ill or injured employees.

Pine Street Station is a branch of the USPS located at 1400 Pine St. in San Francisco, CA. (Tr. 41.) The NALC, Golden Gate Branch 214, is the recognized bargaining representative of employees at this station. (Tr. 41; Jt. Exh. 1 at 2.)

[2] I hereby correct the transcript as follows: Tr. 11, l. 15: "begin" should be "being"; Tr. 67, l. 5: "January 8, 2013" should be "January 8, 2014"; Tr. 124, l. 9: "How hold" should be "Do you hold"; Tr. 125, l. 1: "Pine Station" should be "Pine St. Station"; Tr. 129, l. 3: "he" should be "she"; Tr. 134, l. 1: "decimating" should be "discriminating"; Tr. 135, l. 22: "opposed" should be "posed"; and Tr. 235, l. 13: "his" should be "him".

Through the bargaining relationship between USPS and NALC, a number of governing documents have been negotiated. The National Agreement between USPS and NALC sets the terms and conditions of work and establishes a grievance procedure for members of the bargaining unit during the period from 2011 to 2016. (Jt. Exh. 1.) To educate the local parties on the content of the National Agreement and to facilitate the resolution of disputes, the Joint Contract Administration Manual (JCAM) provides an interpretation of the National Agreement that has been accepted by both USPS and NALC. (Jt. Exh. 2 at 3; Tr. 141.)

Articles 13 and 30 of the National Agreement and Articles 13 and 30 of the JCAM allow for "local negotiations" in which each office may implement a Local Memorandum of Understanding (LMOU) that includes terms governing the assignment of work to ill or injured employees. (Tr. 141–143; Jt. Exh. 1 at 7–13; Jt. Exh. 2 at 16–27, 64–71.) The JCAM states that there are two categories of ill or injured employees: Limited Duty and Light Duty. (Jt. 2 at 16.) Limited Duty employees are employees who were injured on the job, and Light Duty employees are employees who were injured or became ill outside of work, and they both have medical work restrictions. (Tr. 144, 217.) The USPS has a greater obligation to find work for Limited Duty carriers than it does for Light Duty carriers. (Tr. 220.) The LMOU negotiated between the San Francisco division of USPS and the representatives of the NALC Golden Gate Branch 214 states that management will make "every effort" to "reassign an ill or injured Carrier within his/her present craft or occupational group." (GC Exh. 12 at 14.) In the LMOU, "answering phones" is among the "light duty assignments" available to ill or injured Carriers. (GC Exh. 12 at 14.)

In addition to the above documents, in April 2013, the USPS published a revised copy of its Employee and Labor Relations Manual (ELM). (Jt. Exh. 3.) The ELM codifies the rules and regulations that govern the employment of postal employees. (Jt. Exh. 3 at 1.) Under Section 546 of the ELM, the employer is obliged to "make every effort" to find work for Limited Duty employees that is "consistent with the employee's medically defined work limitation tolerance." (Jt. Exh. 3 at 27; Tr. 220.) The ELM goes on to describe in detail the procedures that management must follow to assign work to Limited Duty employees. (Jt. Exh. 3 at 28.)

B) Ophelia Sosa worked for Respondent and suffered an injury which caused her to become a Limited Duty Carrier.

Sosa has worked as a letter carrier for Respondent, USPS, for 28 years and has been working at Respondent's Pine Street Station since 2010. (Tr. 41–42.) Sosa has been a shop steward for the NALC since 2011. (Tr. 41–42.)

As a letter carrier, Sosa's duties included casing and pulling down her delivery route, and delivering the mail. (Tr. 189.) Following a workplace related injury, Sosa was reclassified as a limited duty carrier in April 2011. (Tr. 43.) Yearly, Sosa submitted her medical restriction documentation to Respondent using Form CA 17 beginning in 2010. (Tr. 47–48; GC Exh. 7; Jt. Exh. 4.) A medical evaluation completed by the Occupational Workers Compensation Program

(OWCP) under the U.S. Department of Labor in November 2012, determined that Sosa could only walk and stand for 2 hours per day, push and pull 20 pounds for 2 hours per day, and lift 10 pounds for 1 hour per day. (Jt. Exh. 4; Tr. 45.) These medical work restrictions prevented Sosa from completing the daily delivery route as a letter carrier. As a limited duty carrier, Sosa was relieved from the delivery portion of the job. Sosa received benefits from the OWCP to compensate for the hours she was unable to work due to her medical work restrictions. (Tr. 44; Jt. Exh. 3 at 24–25.) Those benefits compensated Sosa with either 66 percent or 75 percent of the wages Sosa would have earned but for her injury. (OWCP website http://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/CA-810.pdf at 67.) OWCP cuts off these benefits to those workers, however, who refuse a suitable job offer that complies with an employee's medical restrictions. (Tr. 215.)

C) In April 2013, Sosa was assigned the light duty position of answering phones, increasing her work hours to a full 8 hours per day.

As a limited duty carrier, Sosa initially worked 5–6 hours per day, 5 days per week, casing and pulling down her delivery route. (Tr. 56–57.) The letter delivery was performed by another employee. (Tr. 189.) From about October 2012, to April 2013, Judy Trejo, another limited duty carrier, answered the telephones at the Pine Street Station about 1–3 days per week. (Tr. 63–64, 125, 175–176, 196.)

In April 2013, Mr. Joseph Stallworth (Supervisor Stallworth) , a supervisor at Respondent's Pine Street Station, and Mr. Seabron Bowler (Manager Bowler), the manager of the Pine Street Station at the time, assigned Sosa to the light duty position of answering four telephone lines in addition to pulling mail and casing her route. (Tr. 54–56, 177.) Trejo continued to answer the telephones when Sosa was unavailable to answer them. (Tr. 57, 177–178.) With the additional duties, Sosa worked 8 hours per day, allowing her to earn a full wage without exceeding her medical work restrictions. (GC Exh. 8 at 26–27.) Twice while Sosa was assigned to phone duties, Supervisor Rosales informed her that she was paging the supervisors too often, that they were busy doing other things, and that she should take a message. (Tr. 192–193.)

On May 10, 2013, a staff meeting was held that included several managers, supervisors and employees. (Tr. 64–65.) During that meeting Manager Bowler, praised Sosa's performance and professionalism in answering the telephones. (Tr. 64–65, 128–129.) He stated that he received compliments from customers, San Francisco Postmaster Raj Sanghera, and Manager of Customer Service Operations at the Pine Street Station, Ravi Bainiwal (Manager Bainiwal) for the work she was doing answering phone lines. (Tr. 64–65, 128–129.) Bainiwal was present at the meeting, and affirmed Bowler's statement that he had complimented Sosa's work by nodding. (Tr. 128–129.) The nature of the position for the various supervisors/managers mentioned in this case have caused them to be quite nomadic as they regularly work at a variety of Respondent's San Francisco facilities including, but not limited to, Pine St. Station, North Beach, Bayview Annex, Bryant St., and Townsend St. Station. (Tr. 61–62, 185–186; Jt. Exh. 9.)

Manager Bowler was manager at the Pine St. Station location from Sept. 5, 2012 through June 14, 2013. (Tr. 127.)

D) Respondent's agents asked Sosa if she was going to be a witness at a ULP hearing; Sosa testifies at the June 18 hearing against Respondent.

On May 18, 2013, Supervisor Stallworth approached Sosa to discuss an upcoming hearing regarding alleged unfair labor practices against Respondent which was scheduled for June 18, 2013. (Tr. 66, 78–79.) Supervisor Stallworth explained to Sosa that Supervisor Cheng wanted to know if she was "going to be a witness." (Tr. 78–79.) Sosa responded, "A witness to what?" (Tr. 79.) Supervisor Stallworth said he did not know, so they went together to ask Supervisor Cheng what it was he wanted to know. (Tr. 79.) Cheng explained that there was an unfair labor practice charge filed by another employee and set for hearing, and he wanted to know if Sosa was going to be a witness at that hearing set for June 18, 2013. (Tr. 79.) Sosa replied that she was "not the witness." (Tr. 79.)

Prior to the June 18 hearing, Sosa received a subpoena from the General Counsel to testify at the hearing. (Tr. 79.) Sosa gave a copy of the subpoena to Supervisor Rosales and requested the time off to testify. (Tr. 80.) On or about June 15, 2013, Sosa reminded Supervisor Stallworth or Supervisor Rosales that she was taking the day off on June 18 to attend the ULP hearing. (Tr. 80.) At the hearing on June 18, the General Counsel called Sosa to testify against the Respondent. (Tr. 66, 75–77.) Supervisors Cheng and Stallworth testified counter to Sosa, in defense of the Respondent. (Tr. 75–76.) The case concluded when the Respondent and General Counsel agreed to a formal settlement stipulation on July 22, 2013, resulting in a cease and desist order and published notice against the Respondent. (Tr. 66–67, 72; GC Exhs. 2–5.)

E) After testifying at a Board hearing, Sosa is removed from the duty of answering phones

During the last week of June 2013, Mike Datangel (Manager Datangel) became the new manager at Pine Street Station. (Tr. 80–81.) Shortly afterward, Supervisor Stallworth told Sosa that Supervisor Cheng complained to Manager Datangel about Sosa and requested that she be removed from answering the phones. (Tr. 81, 135; GC Exh. 11 at 1.) On or around July 22, 2013, Sosa overheard a conversation in which Supervisor Cheng told Janette Guerra (Guerra), another limited duty carrier, to ask her doctor to change her medical work restrictions so that she could work 8 hours per day. (Tr. 81–82.) Supervisor Cheng said that if Guerra did this, he would assign her the light duty position of answering the phones, the same position held by Sosa at that time. (Tr. 82.) As of July 27, 2013, Janet Guerro's medical restrictions of 4 hours per day were released by her doctor to increase to 8 hours per day as reflected by her doctor's notes. (Tr. 121–122.)

By mid-July 2013, Manager Datangel was soon replaced by Manager Bainiwal as the manager of the Pine Street Station. (Tr. 132.) On July 24, 2013, Manager Bainiwal instructed

Supervisor Rosales to tell Sosa that there was no light duty work answering phones available and that she should go home. (Tr. 83.) On or around July 27, 2013, Guerra was assigned the light duty position of answering the phones. (Tr. 84–85, 121, 127.) As a result of this reallocation of work duties, Sosa's hours were reduced from 8 hours per day to 2–1/2 hours per day. (Tr. 84; GC Exh. 8)

In August 2013, James Luiz (Manager Luiz) became the manager of Pine Street Station. (Tr. 85.) On or around August 24, 2013, Supervisor Stallworth told Sosa that Manager Luiz may have thrown away her medical records to make things hard for her. (Tr. 86.) Supervisor Stallworth said that because Manager Luiz could not locate any documentation that restricted Sosa from delivering, Sosa could start delivering mail for 2 hours per day in addition to casing and pulling the route. (Tr. 86, 101–102.) When Sosa protested, affirming that such an assignment would be against the restrictions in her medical documentation, Supervisor Stallworth suggested "Maybe Jim [Manager] Luiz threw them away to make things hard for you." (Tr. 86.) In the same conversation, Supervisor Stallworth stated that management would be offering Sosa a new job. (Tr. 86, 102.) He said that if she refused the offer, Manager Luiz would send her home and call OWCP to let them know she was refusing work, so that her benefits would be cut. (Tr. 86, 102.) Finally, Supervisor Stallworth told Sosa that she had a "target on her back" and that Manager Luiz was "out to get" her. (Tr. 86.)

On August 27 Supervisor Stallworth presented Sosa with a job offer that included 2 hours and 28 minutes of casing and pulling down the route as well as 2 hours of carrying mail on the route. (Tr. 86–88; Jt. Exh. 5.) Sosa protested to Manager Luiz and Supervisor Stallworth that she could not do this assignment because the weight of the mail cart exceeded her medical limitations and because the casing and pulling down portion of her job already required her to stand and walk, so she could not complete 2 hours on top of that. (Tr. 87–89.) Sosa accepted the job under protest by signing the offer and writing in her objection above her signature. (Tr. 88–89; Jt. Exh. 5.) Supervisor Stallworth took Sosa's new job offer to the Respondent's Health and Resource Management office to determine whether it violated Sosa's medical work restrictions. (Tr. 90, 214–216.) This office determined that the job offer did, in fact, violate Sosa's medical work restrictions. (Tr. 90, 215–216.)

Three days later, on August 30, Supervisor Stallworth made a second job offer, which contained only 2 hours and 28 minutes per day of casing and pulling down the route. (Tr. 90–91; Jt. Exh. 6.) Sosa accepted this offer and began working that schedule the next day. (Tr. 90–91; Jt. Exh. 6.)

F) A grievance was filed on Sosa's behalf and resolved in her favor.

Earlier in August, Bradford Louis, a NALC shop steward at Respondent's Pine St. branch, filed a grievance on Sosa's behalf concerning her removal from telephone answering duties. (GC Exh. 10.) As part of the investigation, Louis interviewed Manager Datangel, and

documented his answers. (GC Exh. 11.) In this interview, Manager Datangel stated that Sosa's work answering phones was "fine," and that Supervisor Cheng had requested she be removed from this duty. (Jt. Exh. 11.) The Dispute Resolution Team resolved the grievance on December 5, 2013, and issued a decision finding that the Respondent had violated the National Agreement between USPS and NALC by removing Sosa from her full time limited duty carrier position. (Jt. Exh. 7.) The decision ordered that Sosa be reinstated and made whole by providing backpay from July 24, 2013 through the date of her reinstatement. (Jt. Exh. 7; Tr. 92.) Sosa was reinstated on January 8, 2014, but she has not received backpay for the period she was deprived of her phone answering duties. (Tr. 92–93.) Because the grievance resolution did not fully remedy Sosa by making her whole with full backpay and because the grievance resolution did not provide for cease and desist language or for a Notice Posting to employees, I decide this case.

ANALYSIS

I. CREDIBILITY

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

The General Counsel has requested that I draw an adverse inference based on the Respondent's failure to call Supervisor/Manager Cheng, Bowler, Stallworth, Luiz, or Bainiwal as witnesses. The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where, as here, the witness is the Respondent's agent. See *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). As the other on-site managers/supervisors with authority over Sosa, these 5 agents of Respondent are the only persons capable of reconciling the factual differences between Sosa and Louis on the one hand, and Supervisor Rosales, on the other hand, as to Respondent's adverse actions in July and August 2013, against Sosa. I find, under the circumstances present here, that adverse inferences are appropriate. As such, where Cheng, Bowler, Stallworth, Luiz, and Bainiwal would each have been assumed to testify about an asserted fact, I will presume that each of their testimony would be adverse to the Respondent and favorable to the General Counsel. As a result, I reject Rosales' unsupported testimony that

only supervisors were qualified to answer phones at Pine St. Station and that Sosa was loud and demanding and did not perform her answering phone duties in a complimentary manner.

Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below. My general observation, however, was that Sosa was extremely forthright, honest, and thoughtful when she testified. She did not appear to be embellishing her testimony. Shop steward Louis was not the most articulate witness and some of his interview notes with Manager Datangel are poorly drafted and unclear, but I did not find this to be indicative of credibility. This is so not only because Louis testified in a confident manner but because Louis also testified against his own interests as he remained employed at Respondent at the time of trial and must continue to face Respondent's management after trial. As a current employee testifying against his own pecuniary interests, I find his testimony to be particularly reliable. See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries, Inc*., 197 NLRB 489, 491 (1972).

II. JURISDICTION

The Respondent reargues that the Board's jurisdiction over Respondent is both granted and limited by Section 1209 of the Postal Reorganization Act (PRA), permitting Respondent's employee-management relations to be subject to the provisions of subchapter II of chapter 7 of title 29 *only to the extent not inconsistent with the provisions of title 39*. (39 U.S.C.A. § 1209(a)). (Emphasis in original argument.) Respondent further provides that in the instant case, the Board has overreached, assuming jurisdiction over matters reserved to the Merit Systems Protection Board. (39 U.S.C.A. § 1005(c); 5 U.S.C.A. § 8151(b); 5 C.F.R. § 353.101 et seq.). The Respondent concludes by arguing once again that insofar as the Board's exercise of jurisdiction over Respondent in the instant case is inconsistent with the provisions of the PRA, the Board lacks jurisdiction to hear this complaint.

On March 12, 2014, the Board rejected the Respondent's identical argument and ordered that it has jurisdiction over the Respondent and this matter by virtue of Section 1209 of the PRA, 39 U.S.C. Section 101 et seq. I am bound by the Board's March 12 ruling on this issue and find that it is law of the case. (GC Exh. 1(n).)

III. ALLEGATIONS OF RETALIATION FOLLOWING SOSA'S TESTIMONY AT ULP HEARING

The Respondent allegedly reduced Sosa's work hours by removing her telephone duties on July 24, 2013, and by implementing a new job offer on August 24 and 30, 2013, that was in violation of Sosa's Limited Duty medical restrictions. General Counsel's complaint paragraphs 5, 6, and 8 allege that on or about July 24, August 24, and August 30, 2013, Respondent engaged in conduct because Sosa testified at a June 18, 2013 ULP hearing and Respondent's conduct in threatening Sosa with discipline if she refused a new job offer changing her job duties and reducing her hours, removing Sosa from her light duty position of answering telephones and reducing her work hours, and implementing a new job offer that further reduced her hours,

Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation Sections 8(a)(1) and (4) of the Act within the meaning of the PRA.

Section 8(a)(4) of the Act makes it unlawful "to discharge or otherwise to discriminate against an employee because he or she has filed charges or given testimony under this Act." 29 U.S.C. 158. In determining whether an employer has violated section 8(a)(4), an inquiry must be made into its motivations through application of the *Wright Line* test. *Parker Labs., Inc*., 267 NLRB 1174, 1179 fn. 18 (1983). This inquiry first places a burden on the General Counsel to provide a prima facie showing that the protected conduct as a "motivating factor" of the employer's action. *Wright Line*, 251 NLRB 1083, 1087 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Auto Nation, Inc. & Village Motors, LLC*, 360 NLRB No. 141 (2014). After this has been established, the burden then shifts to the employer to prove that it would have taken the same actions regardless of whether the employee engaged in protected conduct. Id. "If, however, the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails." Id. Slip op. at 4.

Prior to applying the *Wright Line* test, however, I first want to address whether the employer's action was actually adverse, an issue raised in Respondent's brief. When Manager Bainiwal revoked Sosa's light duty phone duties, her work schedule was reduced from 8 hours per day to 2.5 hours per day. When Manager Luiz implemented a new job offer, that reduction in work hours was made permanent. Respondent argues that these actions are not adverse because Sosa received compensation for the difference of 5.5 hours per day from OWCP. The compensation from OWCP, however, only amounted to 66 percent or 75 percent of the wages she would have earned but for the employer's action. It is clear that a 25 percent to 33 percent reduction in income during the compensated hours was adverse to Sosa's economic interests. By revoking Sosa's light duty phone duties and then implementing a job offer with permanently reduced hours, I find that the Respondent took an adverse employment action against Sosa.

A. General Counsel meets its initial burden under Wright Line.

For the reasons that follow, I find that the General Counsel has made a prima facie showing that Sosa's testimony against Respondent at the June 18, 2013 unfair labor practice hearing was a motivating factor in the Respondent's July 2013 decision to remove light duty phone duties and implement a job offer with reduced hours.

To satisfy its initial burden, the General Counsel must establish three elements by a preponderance of the evidence: 1) that the employee engaged in protected concerted activity, 2) that the employer was aware of that activity, and 3) that there was union animus on the part of the employer. *Wright Line,* supra; *Wal-Mart Stores, Inc*, 352 NLRB 815, 871 (2008); *Inova Health System*, 360 NLRB No. 135 (2014). Importantly, the *Wright Line* test "does *not* require

the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional undefined "nexus" between the employee's protected activity and the adverse action." *Auto Nation, Inc. & Village Motors, LLC*, 360 NLRB No. 141, slip op. at 4, fn. 10. Establishing the existence of protected activity, knowledge, and animus on the part of the employer is sufficient to support the General Counsel's prima facie showing.

First, there is no doubt that Sosa testified against the Respondent at an unfair labor practice hearing on June 18, 2013. This point is undisputed and well-documented. Such testimony is expressly protected by Section 8(a)(4) of the Act. Prior to that date, Sosa had been complimented by two managers, Bowler and Bainiwal, and others, for her good work answering the phone and resolving customer service matters and passport inquiries.

Secondly, the General Counsel has shown by a preponderance of the evidence that the Respondent had knowledge that Sosa had testified in the hearing. In May 2013, Supervisor Stallworth approached Sosa and told her that Supervisor Cheng wanted to know if she would be testifying at the June 2013 ULP hearing. In addition, shortly before that hearing, Sosa gave Supervisor Rosales a copy of a subpoena calling her to testify at the hearing and asked to take June 18 off of work. On June 15, Sosa reminded her supervisor, either Supervisor Rosales or Supervisor Stallworth, that she had requested to take the day off of work. Sosa by subpoena, and Supervisors Stallworth and Cheng testified at the June 18 hearing, Sosa for the General Counsel and the supervisors for the Respondent. (Tr. 66, 75–76.)

I find that Respondent's supervisors discussed the June 18 ULP hearing with each other and with employees. This demonstrates a heightened level of interest in the unfair labor practice proceeding, and I find that General Counsel has proven by a preponderance of the evidence that Supervisor Rosales informed the other supervisors, including Supervisors Cheng and Stallworth that Sosa would be participating as a witness. I further find that Respondent knew or should have known that the subpoenaed Sosa was testifying against Respondent as the General Counsel and not the Respondent called Sosa as a witness to testify in support of Louis' case against Respondent, Stallworth, and Cheng. It is also likely that Respondent's supervisors and managers, along with its attorney, talk to each other and share information about employees. Moreover, Board precedent does not place the burden on the General Counsel to prove that Supervisor Rosales communicated the information to the supervisors who actually took the adverse employment action. Instead, knowledge held by one of Respondent's supervisors may be imputed to all of Respondent's agents, including the supervisor who actually took the adverse action against Sosa. *State Plaza Hotel* 347 NLRB 755, 757 (2006). The Respondent has the burden of "affirmatively establishing a basis for negating such imputation." Id.; *Copper River of Boiling Springs, LLC & Autumn Ballew & Katie Massey*, 360 NLRB No. 60 (2014).

Here, as in *State Plaza Hotel*, Supervisor Rosales' knowledge may be imputed to Supervisor Cheng, Manager Bainiwal, and Manager Luiz because the Respondent has not

established a basis for negating their knowledge. As stated above, an adverse inference is drawn from the Respondent's failure to present Cheng, Bainiwal, and Luiz as witnesses to rebut General Counsel's evidence. *Roosevelt Memorial Hospital Center*, 348 NLRB 1016, 1022 (2006). Neither has the Respondent offered alternative forms of evidence to refute the element of knowledge. The fact that a month prior to the hearing Sosa told Supervisor Cheng that she was not the witness is not dispositive because Sosa later communicated to Supervisor Rosales that she received a subpoena to testify and would need time off on the date of the hearing to do so. I therefore find that the General Counsel has established the knowledge element of the *Wright Line* test.

Finally, I find that Respondent's interrogation of Sosa prior to the hearing, the threats made after the hearing, and the proximity in time between Sosa's protected activity and the employer's action establish animus on the part of Respondent toward Sosa's protected activity. Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the totality of the circumstances. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). An inference of antiunion animus may be made when an adverse action occurs shortly after an employee has engaged in protected activity. *Real Foods Co.,* 350 NLRB 309, 312 fn. 17 (2007); *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003) (citing *La Gloria Oil*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003)). Additionally, "a supervisor's unlawful, antilabor motivation in making a false report leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting Corp. v. NLRB,* 831 F.2d 112, 117 (6th Cir. 1987); *In Re Golden Foundry & Mach. Co.*, 340 NLRB 1176, 1177 (2003).

One month prior to the June 18th hearing, Stallworth and Cheng each asked Sosa whether she was going to be a witness in the hearing. The questions asked by Stallworth and Cheng had no relation to the performance of work duties. Instead, these supervisors sought to discover whether she was going to participate in concerted activity protected by section 8(a)(4) of the Act. Particularly in context with subsequent events, the Respondent's interrogation into the employee's participation in protected activity suggests antiunion animus.

On July 24, 2013, approximately 1 month after Sosa testified, and only 2 days after the unfair labor practice charge in which she was a witness was settled, the Respondent removed Sosa's light duty phone duties, reducing her hours from 8 to 2.5 per day. An inference of antiunion animus is appropriate in this case, where approximately four weeks had passed from the time Sosa engaged in protected activity and the reduction of her hours. *See* e.g. *Real Foods Co*, 350 NLRB 309, 312-–313 (2007) (finding 3 months sufficiently close in time to support an inference of unlawful motivation); *In Re Lucky Cab Co.*, 360 NLRB No. 43 (2014) (finding an inference of unlawful motivation where 3 weeks had passed).

Perhaps the clearest evidence of animus occurred just days prior to the Respondent forcing Sosa to accept a new job offer that made the hour reductions permanent. Supervisor Stallworth told Sosa that she had a "target on her back" and that Manager Luiz was "out to get" her. He also suggested that Luiz had intentionally thrown away her medical evaluation to make things hard for her. Three days after these clear threats, Luiz initiated a job offer that would make the reductions in Sosa's work hours permanent. Although the threats were made after Respondent's light duty phone duties had already been removed, there is no evidence that any other events occurred during this time that would have caused the Respondent's hostile feelings toward Sosa. Based on the evidence before me, these statements can only be explained as threats made in response to her testimony at the June 18 ULP hearing. They serve as evidence of Respondent's animus against Sosa's protected activity.

Based on the above analysis, I find that the General Counsel has met its initial burden under *Wright Line* to establish that Sosa's testimony at the June 18 ULP hearing was a motivating factor in the Respondent's decision to reduce her work hours by revoking her light duty phone duties and implementing a new job offer. I now turn to evidence offered by Respondent to rebut the finding of unlawful motivation.

B. Respondent fails to rebut the presumption of unlawful motivation.

The Respondent offers multiple reasons for its actions against Sosa. The first is that according to management priorities, it is improper for a letter carrier to be assigned light duty phone duties. The second is that answering the phones is an unnecessary duty at that office and the Respondent took action in order to reduce operation costs by cutting hours. A third reason suggested by Respondent's argument is that Sosa's removal was motivated by her poor performance in answering the phones. For the following reasons, I find each of these arguments pretextual and unsupported by the record.

The claim that answering phones was an improper duty for a letter carrier is not supported by evidence. Instead the record indicates that Respondent regularly assigned such duties to limited duty carriers. Prior to Sosa's assignment of these duties, the phones were answered by Judy Trejo, and after Sosa was relieved of these duties, the phones were answered by Janette Guerra, both of whom are limited duty carriers. Additionally, the assignment of phone duties to limited duty carriers is consistent with the JCAM and the LMOU governing Respondent's worksites within San Francisco. The LMOU lists "answering phones" as an appropriate assignment for injured workers and makes it a priority to find appropriate assignments for limited duty carriers. Contrary to Respondent's claim of impropriety, assigning phone duties to a limited duty carrier appears to be proper according to the Respondent's own interpretation of its contract. Even if it is improper, Respondent has not managed its worksite according to such standards. Instead, Respondent has consistently assigned phone duties to limited duty carriers–Trejo, Sosa, and Guerra. I find that Respondent's claim of impropriety is pretext.

Respondent's claim that it is unnecessary for Sosa to have phone duties is similarly unsupported. Testimony from Supervisor Rosales indicates that the work of the supervisors required that they not be frequently interrupted by phone calls of customers. On multiple occasions Rosales instructed Sosa to take messages instead of paging the supervisors. Prior to assigning Sosa phone duties, Respondent employed letter carrier Trejo to fulfill this need. After removing Sosa's phone duties, the Respondent maintained the existence of this position by assigning the phone duties to letter carrier Guerra. The record indicates that there was a need to have a nonsupervisor answer telephones and take messages, a need that existed prior to and continued after the period when Sosa had been assigned phone duties. The argument that Sosa had been removed in order to cut down on the facility's total work hours is simply not supported by the record because the Respondent merely transferred Sosa's duties to Guerra.

Although Respondent's posttrial brief does not explicitly make this argument, there is a latent claim that Sosa's phone duties were removed with cause. I find that such an argument is merely pretexual. Respondent emphasizes that Supervisor Rosales believed that Sosa contacted the supervisors too often. Rosales instructed her to stop paging the supervisors when they are in meetings and instead take a message. Shortly after Sosa testified at the ULP hearing that alleged unfair conduct of Supervisor Cheng against Louis, Supervisor Cheng had talked to Manager Datangel to request that Sosa be removed from phone duties. Respondent claims that an inference may be made that Cheng felt the same as Rosales and suggests that his request for Sosa's removal was based on such poor performance. Prior to testifying against Respondent at the hearing, however, Sosa's performance and professionalism in answering the telephones was praised by Manager Bowler at a staff meeting. He had received compliments from customers, from the San Francisco Postmaster Raj Sanghera, and from the Manager of Customer Service Operations at the Pine Street Station, Manager Bainiwal.

In the fall of 2013, Manager Datangel also asserted that Sosa's performance answering the phones was "fine." As mentioned earlier, Respondent did not call Cheng to testify, even though he could be expected to have clarified the basis for the complaints about Sosa's performance and corroborated Respondent's alleged version of events. An adverse inference may be drawn from Respondent's failure to call Cheng as a witness. *Roosevelt Memorial Hospital Center*, 348 NLRB 1016, 1022 (2006). Considering this, in conjunction with the strong inference which may be drawn from the reversal of Respondent's opinion of Sosa immediately following her testimony, it is apparent to me that complaints about Sosa's performance are mere pretext for unlawful motivation.

The Respondent has failed to establish a legitimate business purpose for its actions that reduced Sosa's hours. In fact, I find that Respondent, by Manager Luiz, intentionally destroyed or misplaced evidence of Sosa's medical restrictions to falsely require her to accept a new job offer that violated the terms of her medical restrictions. The Respondent has therefore failed to meet its rebuttal burden under *Wright Line* to show that it would have revoked Sosa's phone duties and implemented a new job offer in the absence of her testimony before the Board. The

Respondent has not offered a legitimate business purpose for its adverse employment action against Sosa. As explained above, the claims that Sosa's performance was improper, unnecessary, or inadequate are unsupported by the record and/or are merely pretext for an unlawful motive.

I therefore find that Respondent has violated Section 8(a)(4) of the Act by revoking Sosa's phone duties and implementing a permanent reduction in hours in retaliation against Sosa giving testimony against Respondent at a hearing before the Board.

IV. ALLEGATIONS OF THREATS TO SOSA FOLLOWING HER TESTIMONY AT ULP HEARING

General Counsel's complaint paragraphs 5 and 7 allege that on or about August 24, 2013, Respondent, through Supervisor Stallworth and Manager Luiz, at Respondent's Pine St. facility, threatened employee Sosa with discipline if she refused to accept a new job offer changing her job duties and reducing her work hours in retaliation for testifying at the June 18 ULP hearing and by this conduct, Respondent has been interfering with, restricting, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act and within the meaning of the PRA.

The test to determine whether a remark rises to the level of a threat is "whether a remark can reasonably be interpreted by an employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). The test is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee. The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

Here, I find that under the totality of the circumstances, it was reasonable for Sosa to interpret Supervisor Stallworth's and Manager Luiz' ultimatum of either: (1) accepting the new job offer that violated Sosa's medical restrictions and would have left her with less hours and loss of pay; or (2) they would report her refusal to accept the job offer to OWCP, as a direct threat. Moreover, the August 24 job offer was in retaliation for her testifying at the June 18 ULP hearing and clearly violated the terms of Sosa's medical restrictions. (See Jt. Exh. 4.) Accordingly, I find the General Counsel has met its burden to prove that Supervisor Stallworth and Manager Luiz directly threatened Sosa as alleged, in violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(4) and (1) of the Act by revoking Ophelia Sosa's telephone answering duties on July 24, 2013 and implementing a permanent reduction in hours on August 24 and 30, 2013, in retaliation against Ophelia Sosa giving testimony against Respondent at a Board hearing.

4. The Respondent violated Section 8(a)(1) of the Act by threatening Ophelia Sosa with discharge or reduced wages or hours if she did not accept a retaliatory job offer for less hours and pay because of her protected concerted activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall issue and order recommending it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having directly threatened an employee with loss of employment for engaging in protected concerted activities, the Respondent will be ordered to cease and desist from these actions.

The Respondent, having discriminatorily reduced the hours of Ophelia Sosa, must make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 359 NLRB No. 44 (2012).

Because its supervisors and managers all frequently rotate throughout Respondent's numerous San Francisco facilities, I will order that the Respondent post a notice at all of its San Francisco facilities in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 5–6 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id., slip op. at p. 3. See, e.g*., Teamsters Local 25*, 358 NLRB No. 15 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, United States Postal Service, San Francisco, California, its officers, agents, successors, and assigns, shall cease and desist from threatening or discharging employees for their protected, concerted activities or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act:

a) Make Ophelia Sosa whole for any loss of earnings and other benefits suffered as a result of the retaliation against her, in the manner set forth in the remedy section of this decision.

b) Compensate Ophelia Sosa for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate quarters.

c) Within 14 days from the date of this Order, remove from its files any reference to the reduced work hours and pay of Ophelia Sosa from July 24, 2013 through January 8, 2014, and, within 3 days thereafter, notify her in writing that this has been done and that the unlawful retaliation against her will not be used against her in any way.

d) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e) Within 14 days after service by the Region, post at all of its facilities in San Francisco, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director of Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employment by the Respondent at all of its San Francisco facilities at any time since July 24, 2013.

f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 18, 2014

Gerald M. Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post, mail, and abide by this notice.

WE WILL NOT threaten employees because they testify at unfair labor practices hearings before the Board.

WE WILL NOT remove an employee or reduce their hours and wages and benefits for testifying at an unfair labor practices hearing before the Board.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL make Ophelia Sosa whole for any loss of earnings and other benefits suffered as a result of her unlawful loss of duties and/or hours, less any net interim earnings, plus interest.

WE WILL reimburse Ophelia Sosa an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no retaliation against her.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Ophelia Sosa, it will be allocated to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reduction of hours of Ophelia Sosa and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful discrimination will not be used against her in any way.

UNITED STATES POSTAL SERVICE

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-111346 or by using the QR code below. Alternatively, you can obtain a copy o f the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.